diversity, should we be concerned with maximizing the range of different program types, or maximizing competing sources of each type of programming, or both?

4. Approaches to Establishing Horizontal and Vertical Limits

38. *Scope of Legal Authority.* The *Time Warner II* court suggested several ways cable operators could unfairly impede the flow of programming that might form the basis of a horizontal limit.[155] The court explained that the Commission might justify a limit if it could establish that a single large cable operator acting alone would be able to act anticompetitively by "extort[ing] equity from programmers or forc[ing] exclusive contracts . . . while serving somewhat less than [the market share] . . . that would allow it unilaterally to lock out a new cable programmer . . . ."[156] It found, however, that the Commission failed to offer any evidence or theory of anticompetitive harm arising from the actions of a single cable operator.[157] In addition, *Time Warner II* acknowledged that a cable operator might be able to "exploi[t its] monopoly position in a specific cable market to extract rents that would otherwise flow to programmers," but questioned whether such action would give rise to an important government interest justifying a burden on speech.[158] The court further noted that we must show how cable operators' hard bargaining with programmers to lower programming costs is unfair.[159] Finally, the court stated that the Commission would be justified in ensuring "at least two conduits through which" programmers may reach an adequate number of consumers.[160] The court found that a cable operator's size would constitute an unfair impediment to the flow of programming if that operator were the only viable conduit for programming "independent of concerns over anticompetitive conduct."[161] In the *2001 Further Notice*, in accordance with our statutory mandate, First Amendment principles, and *Time Warner II*, we sought comment on the state of competition in the MVPD market to ensure that our rules are reasonable and serve the public interest.[162]

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[155] *Time Warner II*, 240 F.3d at 1133.

[156] *Id.* We note that, in 1992, Congress instructed the Commission to adopt rules prohibiting cable operators from demanding equity in exchange for carriage. *See* 47 U.S.C § 536; 47 C.F.R. § 76.1301. Despite these protections, *Time Warner II* recognizes that "a single MSO, acting alone rather than 'jointly,' might perhaps be able to do so while serving somewhat less than the 60% of the market (*i.e.*, less than the fraction that would allow it unilaterally to lock out a new cable programmer) despite the existence of antitrust laws and specific behavioral prohibitions enacted as part of the 1992 Cable Act, *see* 47 U.S.C. § 536, and the risk might justify a prophylactic limit [horizontal cap] under the statute." *Time Warner II*, 240 F.3d at 1133.

[157] *Id.* at 1132-34.

[158] *Id.* at 1133. The term "rents" usually refers to "all payments to inputs that are above the minimum required to make these inputs available to the industry." Edwin Mansfield and Gary Yohe, MICROECONOMICS, 462 (10th ed., 2000). Here, large cable operators can use their size and concomitant bargaining power to claim more of the "return" or "surplus" of their deals with programmers. Continued lowered returns on programmers' investment can create an incentive for underinvestment in programming, which can result in inefficiency.

[159] *Time Warner II*, 240 F.3d at 1136 n.6.

[160] *Id.* at 1131-32, 1135.

[161] *Id.* at 1134-35.

[162] *2001 Further Notice*, 16 FCC Rcd at 17320-21 ¶ 7.

39. *Horizontal Limits.* In determining how to set a horizontal limit, we are again guided by the language in the statute and the court's consideration and rejection of our prior limits. In ruling that the Commission had failed to meet the required evidentiary standard, the court in *Time Warner II* stated that we must base our limits on a "non-conjectural risk" of economic harm.[163] Discussing joint action, the court faulted the Commission's failure to point to examples of collusion and stated that "[s]ubstantial evidence does not require a complete factual record – we must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency."[164] The court further stated that the standard requires the Commission to put forth some evidence that indicates prospects for collusion.[165] In discussing other forms of anticompetitive action, the court suggested that sound theory could provide an evidentiary basis for limits, stating "there are theories of anticompetitive behavior other than collusion that may be relevant to the horizontal limit and on which the FCC may be able to rely on remand."[166]

40. In response, cable operators generally oppose the imposition of any ownership limits.[167] Time Warner argues that because foreclosure[168] of entry by video programming services does not constitute a non-conjectural problem, a subscriber limit is neither necessary nor appropriate.[169] Other commenters, pointing to statutory provisions that require us to take account of changing market conditions, as well as the court's instruction to consider the role of DBS in the MVPD marketplace, argue that conditions have changed so markedly since 1992 that the horizontal limits envisioned by Section 613(f) are no longer necessary.[170]

41. In *ex parte* filings since the *2001 Further Notice*, Comcast has proposed a burden-shifting approach to setting cable ownership limits.[171] Comcast argues that marketplace facts

[163] *Time Warner II*, 240 F.3d at 1132.

[164] *Id.* at 1133.

[165] *Id.*

[166] *Id.*

[167] *See, e.g.*, Time Warner Comments at 6-19; AT&T Comments at 4-5; Comcast Comments at 17-18. To support their position, cable operators rely heavily on the arguments of economist Alexander Raskovich, who submitted comments containing his article on pivotal buyers. *See* Raskovich Comments, later revised and published as Alexander Raskovich, *Pivotal Buyers and Bargaining Position*, 51 J. OF INDUS. ECON. 4, 405-26 (Dec. 2003) (Raskovich, *Pivotal Buyers and Bargaining Position*). Time Warner's experts, Paul L. Joskow and Linda McLaughlin, and AT&T's expert, Janusz Ordover, rely on Raskovich's arguments. *See* Jaskow & McLauglin, "An Economic Analysis of Subscriber Limits" (attached to Time Warner Comments and hereinafter referred to as "Joskow and McLaughlin") at 15 n.30; AT&T Comments, Ordover Decl. at 41.

[168] "Foreclosure" means that a large vertically integrated cable operator's decision not to grant a programmer carriage could induce the programmer to exit the market or could deter the programmer from entering the market.

[169] Time Warner Comments at 9-14.

[170] *See, e.g.*, PFF Comments at 7.

[171] *See* Letter from Michael H. Hammer, Willkie, Farr & Gallagher, on behalf of Comcast, to Marlene H. Dortch, Secretary, FCC (Mar. 13, 2003); Letter from James L. Casserly, Willkie, Farr & Gallagher, on behalf of Comcast, to Marlene H. Dortch, Secretary, FCC (Jan. 31, 2003).

demonstrate that the quantity and quality of video programming available to consumers, as well as the source diversity and content diversity, has never been greater. Comcast further argues that there is no evidence of current impediments to the flow of video programming to consumers, or that the number of one cable company's subscribers would create an impediment. In light of the record, as well as the court's decision in *Time Warner II*, Comcast believes that a sustainable hard limit is unattainable. Comcast therefore proposes that the Commission adopt an approach that uses a procedural trigger rather than a hard cap.[172]

42. Under such an approach, Comcast urges, all proposed mergers would be reviewed and would be subject to a public interest analysis, but only those above a specified "soft cap" would require a more detailed information submission and market analysis.[173] Proponents of mergers below the soft cap would still bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest. However, they would be able to establish a prima facie case that the merger is in the public interest by certifying that the combined entity's size does not exceed the soft cap. The burden of proof would then shift to the opponents of the merger, who would need to show the existence of extraordinary circumstances that pose competitive concerns.[174] In essence, Comcast appears to be proposing a form of case-by-case review premised on a procedural trigger, rather than a set numerical limit to the number of subscribers an operator may reach.

43. Some commenters argue that the Commission may satisfy its statutory obligations under Section 613(f) without establishing some form of horizontal limit.[175] As noted above, Time Warner argues that because foreclosure of entry by new video programming services does not constitute a non-conjectural problem, a horizontal limit is neither necessary nor appropriate.[176] Time Warner also argues that Section 613(f) grants the Commission discretion to not impose any limit.[177] AT&T argues that the word "reasonable" in Section 613(f) must be read to permit the Commission to decline to adopt a horizontal limit, particularly where, as here, a regulation restricts speech.[178] Comcast asserts that Congress authorized horizontal limits only to the extent needed to prevent unfair impediments to the flow of programming to consumers, and that the record does not show that cable operators can impede the flow of programming to consumers, "now or in the future."[179]

44. We do not agree with commenters who argue that we have the discretion to forgo imposing a horizontal limit. Section 613(f) clearly states "the Commission shall . . . conduct a proceeding . . . to prescribe rules and regulations establishing reasonable limits on the number of cable

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *See* Time Warner Comments at 9; AT&T Reply Comments at 18-19; Comcast Reply Comments at 4-5.

[176] Time Warner Comments at 9.

[177] *Id.*

[178] AT&T Reply Comments at 18-19.

[179] Comcast Reply Comments at 4-5.

subscribers a person is authorized to reach . . . ."[180] Further, *Time Warner I* held that "[t]he 'subscriber limits' provision directs the Federal Communications Commission to limit the number of subscribers a cable operator may reach."[181] We therefore tentatively conclude that the language of Section 613(f) requires us to set some limit on the number of MVPD subscribers one entity may reach.[182] While the current record contains no evidence of the exact percentage of MVPD subscribers attributed to one entity at which the flow of programming may be impeded, it does provide evidence that if an entity is unencumbered in its subscriber reach, harms are likely to occur.[183] We also tentatively conclude that Congress gave the Commission significant discretion in determining the ownership limits, both in their absolute level as well as in their form and structure. In particular, neither the statute nor the legislative history states a clear preference either for hard limits or against other types of limits. We seek comment on our tentative conclusions that the statutory language requires us to set a reasonable limit on the number of subscribers that a cable operator may reach, and on the scope of our discretion to fashion the form and structure of such limits under Section 613(f).

45. *Vertical Limits.* In the *2001 Further Notice*, we asked for comment on how the changes in the MVPD market and in the level of vertical integration for cable MVPDs may have affected cable operators' ability to favor affiliated over unaffiliated programming.[184] We also sought comment on how application of stringent vertical restrictions might impact economic efficiencies and affect cable operators' investment in, and production of, diverse and high quality programming.[185] Finally, we asked commenters to address the economic basis underlying the concern with vertical integration and market foreclosure.[186]

46. In response to the *2001 Further Notice*, CFA argues that although horizontal market power is the primary focus of this proceeding, vertical market power is the driving force behind the

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[180] 47 U.S.C. § 533(f)(1)(A). In addressing Section 613(f)(1), the legislative history states: "The FCC is given discretion in establishing the reasonable limits on horizontal and vertical integration; however, *the legislation is clear that the FCC must adopt some limitations.* The Committee believes that it has given the FCC enough discretion in the legislation to strike the proper balance. The Committee, therefore, will permit the FCC to establish limits that best serve the public interest. The Committee will then review this decision. Because these markets are dynamic, the FCC should revisit these limitations at appropriate times to ensure that they accurately reflect the policies of the legislation." *Senate Report* at 80 (*emphasis added*). *Compare House Report* at 43 (the House bill directed the Commission to impose limits on horizontal integration, but the House Bill's vertical integration provision, which was not enacted, required the Commission only to conduct a study "to consider the necessity and appropriateness of imposing limitations on vertical integration").

[181] *Time Warner I*, 211 F.3d at 1315.

[182] 47 U.S.C. § 533(f)(1).

[183] Among the findings of the BKS Study was that increases in the size of the largest cable operator can lead to situations in which economic efficiency is reduced, some programmers fail to recover their costs, and smaller cable operators pay more for programming. *BKS Study* at 3-5.

[184] *2001 Further Notice*, 16 FCC Rcd at 17350 ¶ 80.

[185] *Id.*

[186] *Id.* at 17350-51 ¶ 81.

horizontal ownership cap.[187] It argues that vertical market power results in anticompetitive conduct, and that when dominant firms become integrated across markets for critical inputs, there are potential problems. CFA also argues that vertical integration can create barriers to entry.[188] However, CFA fails to offer any argument or evidence on how a channel occupancy limit can prevent the harms it alleges.

47. In its comments, Cablevision argues that given technological advancements and today's "vigorously competitive" MVPD marketplace, no channel occupancy limit will survive constitutional scrutiny.[189] Cablevision argues that competition from DBS significantly affects a cable operator's incentive and ability to favor affiliated programming, since the use of any program carriage criteria other than viewer preference risks driving subscribers into the arms of competitors.[190] Cablevision further argues that Section 613(f) does not require the establishment of channel occupancy limits if the Commission determines that marketplace conditions obviate the need for such rules.[191] NCTA argues that Congress' concerns in 1992 clearly were premised on very different market conditions than those in existence today.[192] NCTA argues that limiting the number of channels that may be occupied by vertically integrated programmers is no longer necessary or useful to advance the government's interest in ensuring that cable operators do not discriminate against unaffiliated programming.[193] Time Warner argues that discrimination on the basis of affiliation is already targeted by other rules.[194] Time Warner further argues that Section 613 only requires the Commission to "conduct a proceeding … ," and that if, after such a proceeding, the Commission finds that no limit is justified, then "reasonable limits" are no limits at all.[195]

48. The express language of Section 613(f)(1)(B) directs the Commission to conduct a proceeding "to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[196] We are not persuaded that the qualifier "reasonable" can reasonably be construed to mean "no" limits, a reading which would effectively grant the Commission discretion to forgo altogether – that is, forbear from – establishment of a vertical limit.[197] Consistent with our

[187] CFA Comments at 93-104.

[188] *Id.*

[189] Cablevision Comments at 5.

[190] *Id.* at 7.

[191] *Id.* at 10.

[192] NCTA Comments at 22.

[193] *Id.* at 22-23.

[194] Time Warner Comments at 36, citing 47 USC § 536(a)(3) and 47 C.F.R. §76.1301(c).

[195] *Id.* at 37.

[196] 47 U.S.C. § 533(f)(1)(B).

[197] Title VI of the Communications Act contains no provision granting the Commission authority to forbear from applying its rules. *Compare* Section 10 of the Communications Act, added by the Telecommunications Act of (continued….)

conclusions above,[198] we tentatively conclude that Section 613(f) requires us to set both cable horizontal ownership and vertical channel occupancy limits at some number. As discussed in greater detail below, we seek comment on how we can set both horizontal ownership and channel occupancy limits that will survive constitutional scrutiny in light of present circumstances.[199]

B. Industry Developments

49. There have been significant changes in the MVPD industry in the last several years that bear upon the question of establishing reasonable cable horizontal and vertical ownership limits. The current MVPD market differs dramatically from that which existed when Congress enacted the subscriber and channel occupancy provisions of the 1992 Act. First, in 1992, there was minimal competition to cable; competition, particularly from DBS providers, has significantly increased since then. Second, cable horizontal concentration and regional clustering have increased since 1992. Third, since 1992, cable plant upgrades have resulted in new, advanced digital services and significantly increased channel capacity. Fourth, the number of national programming networks, and their diversity in terms of sources and content, has increased. Fifth, vertical integration between cable operators and cable programming networks has decreased in percentage terms.[200]

50. Cable operators, as well as other MVPDs, have been increasing their plant capacity, and have upgraded and enhanced system capabilities. As a result, MVPDs are offering substantially more programming networks and are rolling out new, advanced services to their customers. In 1992, most cable systems had a channel capacity of between 30 and 53 analog channels.[201] Today, cable operators are choosing to provide, on average, 70 analog video channels and approximately 150 digital video channels, with enough additional bandwidth to provide high-definition television, video-on-demand, Internet access services, and both circuit-switched and IP-based voice services.[202]

51. In addition to, and possibly as a result of the increased plant capacity of cable operators, the number of national programming networks has increased dramatically in recent years. In 1994, 106 satellite-delivered national programming networks were in operation. By 2001, there were 294. Just two years after the *2001 Further Notice*, the number of networks had increased by 45 channels, to 339, and we now report 388 national programming networks.[203] Similarly, competition among programming networks and their diversity of source and content has increased. We recognize, however, that while the

(Continued from previous page)
1996, 47 U.S.C. § 160 (upon appropriate findings, the Commission may apply forbearance authority to a telecommunications carrier or service in some or all markets); 47 U.S.C. § 332(c)(1) (authorizes the Commission to specify that certain provision of Title II shall not apply to commercial mobile radio service providers).

[198] *See* ¶ 44, *supra*.

[199] *See* Section II. C., *infra*.

[200] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (*10th Annual Report*), 19 FCC Rcd 1606, 1690-91 ¶¶ 141-42; *11th Annual Report*, 20 FCC Rcd at 2832 ¶ 145.

[201] *See House Report* at 31.

[202] *See 11th Annual Report*, 20 FCC Rcd at 2772 Table 3.

[203] *10th Annual Report*, 19 FCC Rcd at 1690-91 ¶ 142; *11th Annual Report*, 20 FCC Rcd at 2832 ¶ 145.

total number of available programming networks has increased, individual viewers tend to concentrate their viewing among a small number of networks.[204] In 1992, there was only one non-broadcast national news network, CNN. Today, CNN competes with MSNBC, Fox News Channel, CNBC, and Bloomberg, among others, for viewers. In children's programming, consumers can now choose from Nickelodeon, several Disney networks, Cartoon Network, and Noggin. With respect to basic service movie channels, before 1992, there was only AMC; now there are TCM, Fox Movie Channel, Sundance, Independent Film Channel and the Lifetime Movie Network. Today, there is also a great variety of more specialized niche programming, such as Food Network, Sci-Fi, Golf, HGTV, Outdoor Life, and the Speed Channel. Even in niches in which an existing network enjoys a strong brand name, new networks are entering, as National Geographic has entered to challenge Discovery.[205]

52. MVPDs are the primary purchasers of multichannel video programming targeted to a national audience. Although non-incumbent MVPDs continue to increase their share of the MVPD market, cable operators serve approximately 72% of total MVPD households.[206] In addition, as of December 2003, the top ten cable operators accounted for approximately 80% of total cable subscribers.[207] Further, as stated previously, since the *2001 Further Notice*, the 2002 Comcast-AT&T cable transaction resulted in Comcast having the largest share of U.S. MVPD subscribers, which is very close to our remanded 30% ownership limit.[208] The 2003 News Corporation-Hughes transaction resulted in DirecTV, already one of the top three MVPDs, becoming vertically integrated with a substantial amount of cable and broadcast programming assets.[209] Also, significant growth in the number of DBS subscribers continues. DirecTV is the second largest MVPD, with approximately 13 million subscribers as of June 30, 2004, an increase of 30% from the approximately 10 million subscribers as of June 2001.[210] EchoStar is the fourth largest MVPD, with approximately10 million subscribers as of June 30, 2004, an increase of 67% over its approximately 6 million subscribers as of June 2001.[211] Basic cable

[204] For example, Nielsen Media Research estimates that the average cable household watches approximately 17 of the 100 plus channels available. *See* Nielsen Media Research, *Television Audience 2004*, Feb. 2005, at 13.

[205] *See 11th Annual Report*, 20 FCC Rcd at 2885-94 Appendix C, Table C-3. *See also* Annys Shin, *Channeling a New Wave of Viewers, National Geographic Pursues a Market with Distinction*, WASHINGTON POST, July 12, 2004, at E-1.

[206] Of 92,295,766 MVPD households, cable subscribers accounted for 66,100,000. *See 11th Annual Report*, 20 FCC Rcd at 2869 Appendix B, Table B-1.

[207] *Cable Developments 2004*, NCTA, at 7, 28.

[208] *See Comcast-AT&T Order*, 17 FCC Rcd at 23263 ¶ 48 (2002). As of March 22, 2005, Comcast had a total of approximately 26.3 million attributable cable subscribers, or approximately 28.5% of all U.S. MVPD subscribers. *See* Letter from Peter H. Feinberg, Comcast Cable Communications, LLC, to Marlene H. Dortch, Secretary, FCC, MM Docket No. 92-264 at 2 (Mar. 22, 2005), *citing Kagan Media Money*, Mar. 2, 2005, at 7 (noting that there are approximately 92.2 million MVPD subscribers nationwide).

[209] *See News-Hughes Order*, 19 FCC Rcd 473 (2004). *See also* n.52, *supra.*

[210] *See 11th Annual Report*, 20 FCC Rcd at 2792-93 ¶¶ 54-55.

[211] *Id.*

subscriptions since the *2001 Further Notice* have actually declined.[212] And the share of national programming services that are vertically integrated with cable operators has also declined, decreasing from 35% in June 2001 to 23% as of June 2004.[213] Vertically integrated programming networks also continue to be the among the most widely available and most popular cable programming networks. In 2004, seven of the top 20 networks ranked by subscribership and three of the top 15 networks based on prime time ratings were vertically integrated;[214] similarly, in 2001, vertically integrated networks represented nine of the top 20 networks ranked by subscribership and six of the top 15 networks based on prime time ratings.[215]

53. Cable operators have also been increasingly upgrading their systems and rolling out advanced digital services such as high-definition television (HDTV), video-on-demand (VOD), high-speed Internet access, and cable telephony (including voice over internet protocol (VoIP)). With digital deployment, depending on the allocation of channels between digital and analog use and the compression ratio employed, cable systems serving the vast majority of cable subscribers now are capable of offering those subscribers well over 200 channels of programming and advanced services.[216]

54. With the growth of system capacity, there has been a rise in the number of cable networks that are seeking to be positioned primarily on cable operators' digital tiers. These networks are generally focused on specialized content, such as movies or sports.[217] College Sports Television has achieved carriage on systems giving it seven million subscribers, mostly on digital sports tiers.[218] In January 2004, Crown Media launched a digital 24-hour channel, Hallmark Movie Channel for placement on digital cable systems.[219] More often than not, these channels are either packaged in wide ranging programming genre packages or in niche packages, such as sports or family only programming.[220] It

[212] In 2001, there were 66.9 million basic cable subscribers. In June 2004, the number had fallen to 66.1 million. *See 11th Annual Report*, 20 FCC Rcd at 2869 Appendix B, Table B-1.

[213] *10th Annual Report*, 19 FCC Rcd at 1690-91 ¶ 142; *11th Annual Report*, 20 FCC Rcd at 2832 ¶ 145.

[214] *11th Annual Report*, 20 FCC Rcd at 2834-35, 2901-02 ¶¶ 150-51, Appendix C, Tables C-6, C-7.

[215] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, (8th Annual Report)*, 17 FCC Rcd 1244, 1363-64, Appendix D, Tables D-6, D-7 (2002).

[216] *Id.* For example, Comcast reports that a typical upgraded 750 MHz plant can provide 84 analog video channels, 216 digital video channels, eight HDTV channels, VOD service for 400 digital video customers at any one time, high speed data service for 400 subscribers, and telephone service for 300 customers. *Id.* at 1625 ¶ 25 n.59.

[217] *See* R. Thomas Umstead, *Diginets Hit the Screen*, MULTICHANNEL NEWS, Dec. 8, 2003.

[218] R. Thomas Umstead, *CSTV Continues to Fight for Acceptance*, MULTICHANNEL NEWS, Apr. 12, 2004.

[219] Crown Media Holdings, Inc., *Crown Media Announces Hallmark Movie Channel* (press release), Nov. 11, 2003.

[220] For example, Cable One, which operates cable systems in the Northwestern and Midwestern United States, offers a "Digital Value Pak" that includes a wide range of channels such as Outdoor Channel, Golf Channel, Fuel, National Geographic Channel, Court TV, Discovery Kids, G4TechTV. Cable One also offers a "Digital Faith and Family Pak" offering family and faith-based network programming. *See* Cable One, Inc., at http:// www.cableone.net/ (visited May 12, 2005).

remains to be seen how specialized digital programming tiers will become. It is possible that the more narrow digital tiers become, a new network in an already existing genre or niche may face difficulty gaining carriage if it is perceived as being duplicative of another network's programming. We seek comment on the impact of digital tiers on carriage for independent networks.

55. *Video-On-Demand/Subscription Video-On-Demand.* VOD permits subscribers to instantly access video programming content on a program by program basis. Similarly, subscription VOD (SVOD) allows a programmer to create a library of content that can be accessed at any time and as often as desired for a monthly subscription fee.[221] Several new networks as well as networks that are seeking cable carriage have announced that they will create content solely for video-on-demand placement. For example, Reality Central, a 24-hour reality programming network, is offering cable companies versions of its exclusive and original programming for broadband and VOD/SVOD.[222] Although VOD presents programmers with a new venue through which to present their content, this business model may constrain the growth of new networks as consumers balk at accepting additional subscription fees to access new and independent programming. We seek comment on the effect that VOD/SVOD may have on the opportunity for independent programmers to gain distribution of their programming.

56. *Internet Distribution.* Increasingly, programmers are directing their content over the Internet for programming distribution. In June 2004, Real Networks, Inc., a streaming media company, announced a partnership with Starz, a provider of premium movie services, to provide cable modem, digital subscriber line (DSL) and other high-speed data users a subscription-based service allowing them to download up to 100 first-run and library-based movies.[223] Movielink, MovieFlix and CinemaNow also offer the ability to access programming via high speed data access, bypassing the traditional video services offered by cable and DBS operators.[224] In addition, Comcast has begun to provide video programming to its Internet customers over its high-speed data lines. On July 21, 2004, Comcast, ABC News, and Walt Disney Internet Group announced a broadband content distribution agreement[225] in

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[221] *See* Simon Bernholt and Pascal Volle, *SVOD: The Optimum Business Model Remains Unclear*, Mercer Management Consulting, Media Context, Oct. 2002.

[222] Reality Central has signed carriage agreements with Insight, which, in addition to carriage on Insight's cable system, includes a cable modem feed, interactive programming feed and daily VOD content. *Launch Pad*, CableFax, Feb. 19, 2004. *See also* Reality Central, Inc., *Mediacom To Carry Reality Central* (press release), May 26, 2004.

[223] Alan Breznik, *Starz, RealNetworks Start Movie SVOD Service on Web*, CABLE DATACOM NEWS, July 1, 2004 (*Breznik Article*). The service costs $12.95 per month. In addition to a library of movies, which will rotate 25% on a monthly basis, subscribers will also have access to a streamed version of the Starz Channel programming that can be subscribed to through a cable or DBS provider. *See also* RealNetworks, Inc., *Starz and RealNetworks Launch First Subscription Premium Movie Service for Broadband* (press release), June 14, 2004.

[224] *Breznik Article*.

[225] *See Comcast, ABC News, and Walt Disney Internet Group Sign Landmark Broadband Distribution Deal* (press release), Jul. 21, 2004, available at http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=594276&highlight= (visited May 12, 2005).

which Comcast will provide its customers with ABC News live and ABC News on demand video,[226] and will also offer an online Kids Channel with interactive games, activities, and videos from Disney. These developments would seem to indicate that programmers have alternative distribution platforms for some types of content. We seek comment on the impact, if any, of Internet-based delivery on the ability of programming producers to reach consumers.

57. Even with the introduction of these additional channels and services, however, cable operators may once again face capacity constraints for the distribution of some types of content.[227] In an effort to address potential constraints proactively, the cable industry is investigating various new technologies to allow operators to attain more capacity over their upgraded plant. Three cable providers, Comcast, Cox, and Time Warner, are reported to be pursuing a project entitled "Next Generation Network Architecture" (NGNA), which is attempting to squeeze more carriage capacity over their upgraded plant through means of various compression technologies and customer premises equipment (CPE). The NGNA project seeks to define the features of a next-generation, all-digital cable network, which could have broad implications for functionality and cost.[228] The effort involves rethinking cable's basic technologies, including everything from encryption strategies to set-top boxes that can be dramatically upgraded via software uploads, to create more carriage capacity by completely migrating cable service from analog to digital transmission so that all services could be provided utilizing Internet Protocol.[229] In addition, instead of offering hundreds of channels at once, cable operators might offer "switched video," treating every channel the way current systems treat VOD: sending channels only when requested by a customer via remote control.[230]

58. We are interested in obtaining information on existing and planned channel capacity and usage, both analog and digital, particularly with regard to the relationship between horizontal ownership and independent cable network distribution. We seek comment on the opportunities, if any, that the increased channel capacity of cable systems provides to independent programmers seeking to launch new channels. To what extent are new programming services launching on digital tiers or VOD? We also seek information on how cable operators apportion channel capacity among cable networks they own or have an ownership interest in, and what relationship, if any, that has to the ability of independent cable networks to obtain carriage. We also request information on how channel capacity is being used, and whether excess capacity on systems exists. Further, we are interested in information on plans for increasing channel capacity through projects such as NGNA, and comment on the implications of such efforts.

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[226] Comcast high-speed Internet customers will be able to access reports from *Nightline, World News Tonight, Good Morning America, This Week, 20/20,* and *Primetime Live. Id.*

[227] *See Communications Daily*, June 21, 2004, at 4.

[228] Jeff Baumgartner, *NGNA: A Sneak-Peek at Cable's Battle Plan for the Future,* CED MAGAZINE (*Sneak-Peek at NGNA*) (May 2004), at http://testced.cahners1.com/ced/2004/0504/05a.htm (visited May 12, 2005).

[229] *Id. See also* John H. Higgins and Ken Kerschbaumer, *Cable Operators: Still No Space 85 Billion Dollars Later*, BROADCASTING & CABLE, June 14, 2004 at 38 (*Still No Space*).

[230] *Id.* at 38.

59. *Unaffiliated Programming Networks*. In an effort to fine tune our inquiry in light of industry developments, we find it useful to examine some of the factors that have been integral to the success of new programming networks that are not affiliated with any cable operator. Generally, successful independent networks that have launched in the past ten years have possessed one or more of the following: a strong, experienced executive suite; programming niches with a track record of viewer support; investor interest from existing content companies, cable distributors or venture capital firms; and a degree of flexibility in negotiating with cable operators for carriage.[231] Are any of these factors critical to obtaining carriage, or are they assumed within the industry as must-have attributes necessary to initiate distribution discussions with cable operators? What specific factors do independent networks lack that retard their ability to obtain carriage? For example, retransmission consent leverage has been used successfully by Disney/ABC and Viacom to gain cable carriage for their new cable networks.[232] In the *News-Hughes Order*, we found that the transaction would increase News Corp.'s incentive and ability to temporarily withhold from other MVPDs access to the signals of its television broadcast stations as a negotiating tactic, and we designed a remedy to this potential harm in our merger conditions.[233] Are independent networks being squeezed out of distribution due to available slots being assigned to larger,

[231] Independent networks such as The Tennis Channel, College Sports Television, The Game Show Network, and Oxygen appear to have leveraged one or more of these attributes to build a distribution base. For example, The Tennis Channel was founded by former executives of Viacom, has secured distribution rights for major U.S. and international tennis matches, has received venture capital financing to support its commercial launch and the creation of original programming, and has focused primarily on obtaining carriage on cable operators' digital tiers. The Tennis Channel launched in May 2003 with three million subscribers. By May 2005, the network was available in approximately 56 million cable homes. *See* Bob Keisser, *Dirtbag Commentator Delivers Sales Pitch*, PRESS-TELEGRAM (Long Beach, CA), May 12, 2005. *See also, e.g.*, Jim McConville, *Biondi-Led Group Lobbing Tennis Channel at Cable*, HOLLYWOOD REPORTER, Aug. 29, 2001; Larry Stewart, *Fledgling Tennis Channel Gains Momentum*, LOS ANGELES TIMES, June 17, 2002. Similarly, College Sports Television's founders have prior cable network experience, attracted approximately $125 million in pre-launch financing, and have secured the rights to a large number of college sporting events. It too has focused on obtaining carriage on cable operators digital tiers and credits its willingness to be placed on a digital sports tier for its early success in obtaining distribution. *See* R. Thomas Umstead, *CSTV Continues Fight for Acceptance*, MULTICHANNEL NEWS, Apr. 12, 2004. The founders have stated, however, that long-term they will need wider distribution than sports tiers to remain viable. *Id.*

[232] In April 1999, Disney/ABC created SoapNet, a 24-hour soap opera channel, in part in response to Sony Corporation's SoapCity, which was created in 1997. Disney used its retransmission consent negotiations involving carriage of its owned and operated local ABC broadcast stations to secure an initial distribution on smaller cable systems covering between three and five million subscribers for its January 2000 launch date. Sony, which did not have the benefit of retransmission consent leverage, failed to secure cable carriage for SoapCity, ultimately diverting the network to an online-only business model. *See, e.g.*, Linda Moss, *Disney's Retransmission Clout Comes to SoapNet's Aid*, MULTICHANNEL NEWS, Nov. 1, 1999; Jim McConville, *SoapNet All Set; Soap City Stalled*, ELECTRONIC MEDIA, Jan. 17, 2000. With respect to Viacom, it announced a multi-year distribution agreement with Comcast covering its broadcast and cable networks. Viacom's press release describing the agreement states that "retransmission will make it possible for Comcast subscribers in CBS owned-and-operated markets to receive CBS's industry leading lineup of high definition television programming" and that "(u)nder the terms of the affiliation agreements, Viacom's MTV Networks (including Spike TV, Comedy Central, CMT and the MTVN Digital Suite) and the BET Networks will continue to be available on Comcast systems nationwide. Additionally, Comcast will augment its digital suite of services by launching Nicktoons and MTV Hits and increasing the distribution of MTV2, Nickelodeon GAS, VH1 Classic and VH1 Country." *See* Viacom, Inc., *Viacom and Comcast Sign Multi-Year Affiliation Agreement* (press release), Dec. 19, 2003.

[233] *See News-Hughes Order*, 19 FCC Rcd at 568, 572-73 ¶¶ 209, 220-21.

vertically integrated programmers? Similarly, cable operator investment has been attributed as a critical factor in the early success of most networks to gain carriage.[234] One analyst found that the major factor determining a successful cable network launch was whether the network was backed either by a major programmer or by a cable operator with large scale distribution.[235]

60. We seek comment on whether there is a relationship between ownership limits, either at present levels or some alternative limit, and the ability of independent programmers to gain carriage from cable operators, and remain independent, viable entities.

C. Economic Basis for Horizontal Limit

61. In this section, we discuss potential harms and benefits of horizontal concentration and proposed economic foundations for establishing a horizontal limit on cable operator size. In response to the *2001 Further Notice*, commenters' positions range from arguing that the horizontal cap should remain at 30% or be lowered,[236] to elimination of the cap,[237] to the adoption of a nationwide case-by-case approach,[238] to using a local market-by-market approach.[239] PFF does not advocate specific horizontal or vertical ownership limits. Instead, PFF urges the Commission to allow the markers the *2001 Further Notice* identified – the statutory mandate, the *Time Warner II* decision, First Amendment principles, and MVPD market conditions – to guide its action on remand. PFF argues that if the Commission heeds these guideposts, it will adopt minimally restrictive ownership limits.[240] AT&T and Time Warner

[234] For example, Oxygen Network received a $100 million investment from Paul Allen's Vulcan Ventures. Paul Allen is the chairman of Charter Communications and is its largest stockholder. *See* Jim McConville, *Allen Buys Again: Invests $100M in Oxygen Media*, ELECTRONIC MEDIA, June 7, 1999. Vulcan Ventures received 7% equity ownership in Oxygen Media and a seat on the company's board of directors. In addition, Oxygen received analog carriage on Charter Communications systems, which served approximately 2.3 million subscribers. According to Oxygen's website, it is currently available in approximately 54 million households. *See* http://www.oxygen.com/basics/about/?slot=footer (visited May 12, 2005).

[235] Kagan World Media, *Upstart Networks: It's All About Who You Know*, Cable Program Investor, Sept 12, 2003, at 4. Kagan reviewed 116 independent, cable operator-owned, and major programmer-owned networks, finding that in 83 of 116 launches, or approximately 72%, involved networks that had investment participation by either a content programmer or a distributor.

[236] CFA Comments at 25. Some cable networks state that 50 million subscribers is the approximate threshold for achieving meaningful national advertising revenues in order to ensure viability. *See* GSN Comments in MB Docket No. 04-207 at 3-4 (Jul. 15, 2004); Crown Media Comments in MB Docket No. 04-207 at 6 (Jul. 15, 2004); Viacom Comments in MB Docket No. 04-207 at 17 (Jul. 15, 2004). As noted in *Time Warner II*, in setting the 30% horizontal ownership limit, the Commission found that "the average cable network needs to reach 15 million subscribers to be economically viable." *Time Warner II*, 240 F.3d at 1131, citing *1999 Cable Ownership Order*, 14 FCC Rcd at 19114-16 ¶¶ 40-42.

[237] Time Warner Comments at 9.

[238] *See* Letter from Michael H. Hammer, Willkie, Farr & Gallagher, on behalf of Comcast, to Marlene H. Dortch, Secretary, FCC (Mar. 13, 2003).

[239] RCN Comments at 18.

[240] PFF Comments at 7.

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generally oppose any type of horizontal limit, arguing that in today's competitive environment, a subscriber limit is neither necessary nor appropriate.[241] Comcast likewise argues that, based on *Time Warner II* and the record, no sustainable ownership limit can reasonably be set.[242] However, Comcast states that if the Commission concludes that some limit is required, the Commission should adopt a burden-shifting approach.[243]

62. Comments filed by competitive MVPDs (*i.e.*, overbuilders) focus mainly on the clustering taking place in some markets by large cable operators. They argue that programmers often accede to the dominance of incumbent cable operators and refuse to sell their programming to overbuilders, who lack a critical mass of subscribers.[244] The Broadband Service Providers Association (BSPA) argues that incumbent cable operators already have the incentive and ability to use their control over sports and other regional programming to foreclose entry by overbuilders.[245] BSPA urges the Commission to address access to terrestrially-delivered programming in this proceeding pursuant to Section 613(f) or Section 628 (*i.e.*, program access rules).[246] RCN argues that the ultimate significance of a national cap is what it means for the local distribution of programming because competition occurs at the local level.[247] RCN is not principally concerned about the total number of MVPD subscribers served by any particular cable operator, but with whether it is frozen out of a target market by anticompetitive tactics.[248] RCN therefore urges the Commission to develop a local market-by-market approach to ownership limits.[249]

63. None of the comments filed in response to the *2001 Further Notice* yields a sound evidentiary basis for setting horizontal or vertical limits. While many commenters presented theoretical, legal or economic arguments and anecdotal evidence, no party provided a compelling approach that supported a particular horizontal or vertical limit. In this section, we discuss and seek comment on an economic foundation for a horizontal limit.[250] We start by discussing our proposed definitions for the various markets and solicit additional information on some remaining questions. Next, we analyze the potential harms of horizontal concentration through various frameworks, discuss the comments received

[241] AT&T Comments at 4-5; Time Warner Comments at 6-19.

[242] Comcast Comments at 17-18.

[243] *See* Letter from Michael H. Hammer, Willkie, Farr & Gallagher, on behalf of Comcast, to Marlene H. Dortch, Secretary, FCC (Mar. 13, 2003); Letter from James L. Casserly, Willkie, Farr & Gallagher, on behalf of Comcast, to Marlene H. Dortch, Secretary, FCC (Jan. 31, 2003).

[244] CMVPDs Comments at 6-7.

[245] BSPA Comments at 4-5.

[246] *Id.*

[247] RCN Comments at 6.

[248] *Id.*

[249] *Id.* at 18.

[250] Vertical limits are discussed below in Section II, D.

in response to the *2001 Further Notice*, and discuss the potential benefits of horizontal concentration. Finally, we request further information on how a horizontal limit can prevent potential harms while protecting potential benefits.

1. Defining the Market

64. The first step in our analysis of whether increasing cable operator size and concentration is likely to reduce competition and impede the flow of programming is to define the markets involved. In the *2001 Further Notice*, we proposed a definition of markets, in which we distinguished between three separate but interrelated markets: the production of programming; the packaging of programming in networks; and the distribution of programming to consumers.[251] While we have received comments on these proposed market definitions, we find that some key questions remain unresolved. We therefore seek comment on certain questions discussed below, and seek further analysis and evidence to help resolve the issues raised.

a) Programming Market

65. In the *2001 Further Notice*, we distinguished between the producers of programming and the networks that packaged this programming and distributed it to subscribers using MVPD facilities. The focus of our analysis was on the ability of networks to gain carriage on cable operators' systems.[252] AT&T argues that we should not be concerned with networks' ability to enter the market, but instead should focus on program producers' ability to find outlets to distribute their programming to the public.[253] Thus, if each network is viewed as simply a conduit for distributing programming to consumers, the problem would then become whether there are sufficient conduits available to ensure that there is a competitive marketplace for programming, which will allow programming to flow unimpeded to consumers.[254] Under this theory, the ability of networks to enter the MVPD marketplace would not be important if there are sufficient conduits for programming to reach consumers. Indeed, we observe that some programs that were rejected or dropped by one network have been picked up by other networks.[255]

66. If, on the other hand, networks play a significant role in developing and producing original and high quality programming, then the entry of new networks will encourage the production and distribution of new programming to consumers. In support of this theory, we note that many networks contract for programming appropriate to their genre, suggesting that these networks may play a critical role in the development and production of programming.[256] We seek comment generally on

[251] *2001 Further Notice*, 16 FCC Rcd at 17321-28 ¶¶ 8-26.

[252] *Id.* at 17321-25 ¶¶ 9-17.

[253] AT&T Comments, Ordover Decl. at 59.

[254] *Id.* This analysis might have to be performed for each niche/genre, to the extent that the market is segmented by niche, as discussed below. Thus a sports channel might not provide a suitable alternative conduit for news, movies, or science fiction programming.

[255] *See, e.g.*, Bill Carter, *ABC Under Disney: Kingdom, Yes. Magic, No.*, The NEW YORK TIMES, Mar. 8, 2004. ABC rejected "Survivor" and "The Apprentice," which found homes on CBS and NBC, respectively.

[256] For example, Oxygen Network launched in February 2000 with 55 hours of original programming. Ron (continued....)

the role that networks play in the production and distribution of programming, and on the role of niche networks in the development of genre-specific programs that may target audiences that are too small and specific to make them attractive to general entertainment networks or networks serving other genres.

b) Programming Distribution Market

67. We previously determined that the programming distribution market should be measured by the number of subscribers rather than the number of homes passed, and that DBS subscribers should be included in the count of total subscribers to which the limit is applied; that is, that the limit should be formulated as a percentage of all MVPD subscribers, rather than as a percentage of cable homes passed.[257] CFA argues that we should not include DBS subscribers in the calculation of total subscribers. CFA claims that DBS services appeal only to customers seeking a higher quality and higher priced product, and are not a substitute for cable services for the typical "lunch bucket" cable subscriber.[258] Some commenters have also discussed the importance of alternatives to MVPDs, such as the sale and rental of DVDs and videocassettes, to distribute programs.[259] We again seek comment on the appropriate definition of the programming distribution market. We specifically seek comment on our decision to include DBS subscribers in the formulation and application of a limit. We observe that DirecTV and EchoStar rank among the top five MVPDs today,[260] and that DBS equipment prices have fallen significantly such that DBS has become more comparable to cable service.[261]

68. We seriously question, however, whether other physical conduits, such as theatrical showings in movie theaters and sales and rentals of VHS tapes and DVDs, should be included in our analysis of the distribution market. The economics literature indicates that in many cases these conduits merely represent separate exhibition windows and not alternative means of entry.[262] We tentatively conclude these other conduits should not be considered part of the same market of programming network distribution because they are not a means for network programmers to distribute their programming. We seek comment on this tentative conclusion.

(Continued from previous page)
Grover, *Does Oxygen Have Enough Money to Burn*, Business Week Online, Dec. 10, 1999. CSTV has developed 100 original 30-minute shows. *See* College Sports Television, *CSTV Goes Back to School with Launch of CSTV U. Programming Initiative Featuring "Curriculum" of 100 30-Minute Instructional and Educational Shows Aimed at Aspiring Athletes* (press release), Apr. 12, 2004.

[257] *1999 Cable Ownership Order,* 14 FCC Rcd at 19101 ¶ 5.

[258] CFA Comments at 45, 151-71. CFA refers to those consumers that only purchase the basic and expanded basic tiers of cable service as the "lunch bucket crowd" and estimates that 42 million subscribers fall in this category. CFA Comments at 159.

[259] *See* AT&T Comments, Ordover Decl. at 56-57.

[260] *See* ¶ 52, *supra.*

[261] *See 10th Annual Report*, 19 FCC Rcd at 1609, 1652 ¶¶ 5, 68; *11th Annual Report*, 20 FCC Rcd at 2794-95 ¶¶ 56-57. *See also* U.S Government Accountability Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, GAO-05-257 (Apr. 2005) (*2005 GAO Report*).

[262] Owen & Wildman, VIDEO ECONOMICS 26-38 (1992); Barry Litman, *The Motion Picture Entertainment Industry*, THE STRUCTURE OF AM. INDUS. 199-200 (Walter Adams, ed. 8th ed. 1990).

c) Relevant Geographic Markets

69. In the *2001 Further Notice*, we recognized that "[t]he geographic market for certain types of niche programming may . . . be national or international in scope" and sought comment on this conclusion.[263] Some commenters allege that the market for programming is international.[264] Other commenters say we should also consider regional markets.[265]

70. We continue to find it reasonable to concentrate our inquiry on the effects of cable concentration in the United States, and ask for comment on this tentative conclusion. We have concluded in the past that the programming market is at least national.[266] No commenter has presented economic data that define the contours of the programming market. Instead, commenters make the uncontroversial point that domestic programmers sell some programming to international buyers and also rely on distribution outlets other than cable or DBS. We tentatively conclude that the relevant geographic market is, for purposes of the Section 613(f) analysis, no greater than the United States. We also believe that regional markets may be relevant when considering programming, such as regional sports and news networks, that is only of interest to, or available in, a particular region. As discussed further below,[267] we seek comment on whether and how the existence of regional markets should affect our development of horizontal and vertical limits. Would a regional limit on concentration better effectuate any of the statutory purposes set forth in Section 613(f)(2), and if so, under what circumstances, and what would be the measure?

2. Potential Harms of Horizontal Concentration

a) Analytical Frameworks for Economic Analysis of Harms

71. In this section, we seek further comment on the appropriate economic framework for determining whether, and at what level, a cable operator's size is likely to impede the flow of programming to consumers or diminish effective competition. As described above, we have not found sufficient economic evidence in the record to make such a determination. We discuss in this section the strengths and weaknesses of a number of analytical frameworks and economic theories that have been proposed. We also discuss arguments and evidence that have been put in the record concerning the viability and usefulness of these analytical frameworks. Within the context of each analytical framework, we further consider the strength of the evidence concerning whether a horizontal limit is necessary to ensure the flow of programming.

(1) Open Field Approach

72. In the *1999 Cable Ownership Order*, the Commission adopted horizontal limits based on a theory that cable operators at certain concentration levels could effectively prevent programming

[263] *2001 Further Notice*, 16 FCC Rcd at 18532 ¶ 9.

[264] *See, e.g.*, AT&T Comments at 20-24; Cablevision Comments at 21.

[265] *See, e.g.*, CFA Comments at 112-17.

[266] *AT&T-Comcast*, 17 FCC Rcd at 23269 ¶ 43.

[267] *See* ¶ 148, *infra*.

networks from entering or surviving in the marketplace simply by deciding not to carry them.[268] The Commission found that a new programming network needs to access 15 to 20 million subscribers and that the typical programming network had only a 50% chance of actually reaching all available MVPD subscribers.[269] The Commission concluded that a programmer needed to have an "open field" of 40% of MVPD subscribers nationwide and that a 30% MVPD subscriber limit would assure that a 40% open field remained even if the two largest cable operators decided not to carry it.[270] The Commission determined that calculations of the horizontal limit should include all MVPD subscribers, including non-cable MVPD subscribers, to take into account the increased market share of non-cable MVPDs.[271]

73. The *Time Warner II* court rejected certain aspects of this approach, finding that the Commission lacked any evidence that cable operators would collude and that it could not simply assume that cable operators would coordinate their behavior.[272] Further, the court held that Section 613(f)(1) does not authorize the agency to regulate the "legitimate, independent editorial choices of multiple MSOs."[273] Thus, the court found that the record supported only a 60% limit under the Commission's 40% open field premise.[274] However, the court did not reach the question of whether the 40% open field assumption was reasonable. In discussing the open field approach, the court admonished the Commission that market share does not necessarily equate with market power.[275] The court stated that on remand the Commission should take into account relevant measures of market power, and elasticities of supply and demand vis-à-vis other MVPD offerings, mainly DBS.[276] The court was specifically referring to the effects of retail competition from DBS and other MVPDs and consumer demand for programming on a cable operator's incentive to foreclose an unaffiliated programming rival from carriage in an effort to favor a competing programming network that is affiliated with the cable operator.[277]

74. *Issues in Utilizing an Open Field Approach.* In the *2001 Further Notice*, the Commission asked for comment on the open field approach.[278] Pursuant to the court's directive in *Time Warner II*, the *2001 Further Notice* sought comment on what horizontal limit would be necessary to

[268] *1999 Cable Ownership Order*, 14 FCC Rcd at 19116 ¶ 43.

[269] *Id.* at 19114-18 ¶¶ 40-50.

[270] *Id.* at 19118-21 ¶¶ 51-57.

[271] *Id.* at 19121 ¶ 57.

[272] *Time Warner II*, 240 F.3d at 1133-34.

[273] *Id.* at 1130-35.

[274] *Id.* at 1132-33 (accepting, but not addressing the validity of, the Commission's 40% open field premise).

[275] *Id.* at 1134.

[276] *Id.*

[277] *Id.*

[278] *2001 Further Notice*, 16 FCC Rcd at 17338-41 ¶¶ 52-59.

ensure that programmers have access to at least two viable outlets, "independent of concerns over anticompetitive conduct."[279] In response, several commenters claim that an open field approach cannot justify a horizontal limit.[280] For example, commenters point out that many successful programming networks reach fewer than 15 million providers.[281] AT&T lists nearly 50 such networks, and points out that some successful networks are more than five years old and have fewer than three million subscribers.[282] AT&T argues that because advertising supports programming, networks can be viable even if they reach fewer than 15 million MVPD subscribers.[283] More generally, AT&T argues that the open field approach assumes that all services need the same size open field to achieve viability, when in reality the open field requirement is highly individualized and depends on the unique characteristics of each programming package.[284] Commenters also dispute the methods the Commission used to move from the 20% of the industry necessary for network survival to the 30% limit, such as the 50% success rate assumption,[285] and theories of collusion.[286]

75. An examination of the subscriber numbers AT&T cites indicates that many of the programming networks it discusses have subsequently achieved substantial subscriber growth. For instance, AT&T lists Oxygen with 14.7 million subscribers in 2001, but by February 2004, Oxygen had grown to 49 million subscribers.[287] Similarly, AT&T states that the National Geographic Channel had 14.1 million subscribers in 2001, whereas by January 2004, the channel had 47 million subscribers.[288] AT&T also lists the Style Channel in 2001 with 11 million subscribers, but by January 2004 it had 34 million subscribers.[289] These statistics may undermine AT&T's point that networks can survive without more than 15 million subscribers, and they also point to a larger factor that must play a part in our analysis. Programmers may need not just a certain number of subscribers at any point in time, but must also maintain continued growth after that time to have a probability of survival. AT&T's numbers were accurate at the time submitted, but those subscriber numbers have increased over the intervening years.

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[279] *Id.* at 17339-41 ¶¶ 55-58, citing *Time Warner II*, 240 F.3d at 1134-35.

[280] *See* AT&T Comments at 61-66; AT&T Comments, Besen Decl. ¶¶ 3, 11, 14; AT&T Comments, Ordover Decl. at ¶ 145; Time Warner Comments at 19-28; Time Warner Reply Comments at 14-18.

[281] AT&T Comments at 60-65; AT&T Comments, Besen Decl. at 3-6; Time Warner Comments at 24-26; Time Warner Reply Comments at 17.

[282] AT&T Comments at 61-65.

[283] AT&T Comments, Besen Decl. ¶3.

[284] AT&T Comments at 62-5; AT&T Comments, Besen Decl. ¶¶ 3, 11, 14.

[285] AT&T Comments at 65-66; Time Warner Comments at 27-28; Time Warner Reply Comments at 18.

[286] AT&T Comments at 66-68; NCTA Comments at 18-20; Time Warner Comments at 20-23; Time Warner Reply Comments at 15-16.

[287] AT&T Comments at 60-61; *NCTA Cable Developments 2004* at 143.

[288] AT&T Comments at 60-61; *NCTA Cable Developments 2004* at 134.

[289] AT&T Comments at 60-61; *NCTA Cable Developments 2004* at 172.

Presumably, the possibility of this kind of growth was a factor in the programmers' decisions to enter or remain in the market.

76. It does appear that some programming networks can survive with access to few subscribers, perhaps because they have unusually high advertising revenues, obtain high affiliate fees from MVPDs, or have lower-cost programming.[290] Similarly, we expect that there are other programming networks that require access to higher levels of subscribers.[291] The statute does not refer to particular types of programming networks, but rather to programming generally. The simple fact that some networks may be able to survive with fewer subscribers than others does not invalidate the use of averaged data to fashion a limit; rather, it suggests that if we use averaged data, we must recognize that it may underestimate the viability requirements of high-cost networks. Clearly different types of networks need access to different numbers of subscribers. We seek comment on whether we should focus our analysis on the minimum number of subscribers needed by an average network, or instead examine separately the requirements of networks with high-cost and with low-cost programming.

77. AT&T also lists a large number of spin-off networks, such as CNN International, and a variety of Discovery networks, as surviving with very few subscribers.[292] Presumably, programmers with the financial backing of large corporations, and lower costs from economies of scope, can survive longer with fewer subscribers than networks without such backing.[293] The flow of programming from sources other than large corporations could be impeded unfairly even while programmers with the backing of large corporations could survive. We believe that preserving access only for programmers with this kind of financial backing would not serve the goals of Section 613(f).

78. Time Warner argues that there was plentiful entry in the period 1992-2001, including entry by independent networks.[294] It points to a number of factors, including the increase in cable channel capacity and the rise of DBS competition. It also presents evidence that large cable operators have tended to carry more programming over time, both affiliated and unaffiliated, indicating that the increase in size of operators will help, rather than hinder, entry by new networks.[295]

[290] For example, regional sports networks such as those in the Comcast SportsNet and Fox Sports Net networks typically have fewer than five million subscribers. *NCTA Cable Developments 2003* at 178 and 180-189. GoodLife TV Network, a general entertainment network which began service in 1985, survives today with 10 million subscribers. *NCTA Cable Developments 2004* at 102.

[291] *See, e.g., the Survival Analysis*, which found that a national, non-premium network growing at the average rate requires over 19 million subscribers at the end of five years to have a 70% probability of survival over its first five years, and over 41.5 million subscribers to have a 70% probability of survival over its first ten years. *Id.* at 29.

[292] AT&T Comments at 60-61.

[293] AT&T also lists TV Japan as surviving with very few subscribers. AT&T Comments at 60-61. TV Japan, however, is owned by NHK, Japan's largest broadcaster.

[294] Time Warner Comments, Joskow and McLaughlin Decl. at 2-7.

[295] *Id.* at 5-8.

79. CFA, on the other hand, argues that the Commission's 30% limit was too high, and it would instead support a lower limit in the range of 20% to 25%.[296] CFA contends that anticompetitive behavior can occur at levels short of complete foreclosure and in markets with more than two dominant firms. CFA claims that a far greater open field therefore may be necessary for competitive entry by a new programmer, as much as 30 to 40 million subscribers instead of the 15 million figure previously relied on by the Commission, resulting in a limit in the range of 15% to 33%.[297] CFA adds that increased programming costs further underscore the need for an open field of 20 to 25 million subscribers.[298] Writer's Guild argues that DBS operators are not a source of programming diversity, because the limited reach of DBS and other competitive MVPDs restricts their ability to a make programming service viable.[299]

80. We seek additional comment on whether we should continue to use an open field approach, and whether this best meets Congress's goal of ensuring the flow of programming to consumers. Commenters should focus on a programmer's ability to survive in the marketplace without carriage by the largest operator. In other words, we seek to ensure that a programmer denied carriage by the largest operator could nevertheless survive in the marketplace if it gained carriage on all remaining MVPDs. In effect, the programmer viability analysis seeks to identify the subscriber reach necessary for a cable operator to become a pivotal buyer, such that a programming network must gain access to at least some of this operator's subscribers to enter or survive in the market. Commenters advocating the use of an open field approach should also address how we should determine the size of the open field, recognizing that different types of networks may require different subscriber reaches to be viable, depending on the cost of the programming, the target audience, and projected advertising revenue.

81. *Calculating a Limit under the Open Field Approach.* Developing a defensible horizontal limit under the open field approach requires an analysis of the number of subscribers a programmer requires in order to remain viable. Because the court did not specifically address the 40% open field assumption,[300] and because of the passage of time since the Commission first developed the estimates on which it rests, the Commission attempted on remand to gather fresh data on programmer viability. Selected programmers were asked to provide data that would allow us to correlate programmer characteristics with profitability and thereby determine what subscriber reach is necessary for survival in the market.[301] The survey asked cable programming networks to report five years of subscribership information, the year they became profitable, their subscribership at time of profitability, whether they are vertically integrated, and their geographic reach. Unfortunately, the vast majority of responses were incomplete. Most responses came back with little more than address and subscribership information. By itself, this information is not sufficient to allow us to draw any conclusions about viability.

[296] CFA Comments at 195-201.

[297] *Id.* at 196-98.

[298] *Id.* at 198-200.

[299] Writer's Guild Comments at 9.

[300] *Time Warner II*, 240 F.3d at 1132.

[301] A copy of the letter sent to programmers can be found in the record of this proceeding. *See* Letter from W. Kenneth Ferree, Chief, Cable Services Bureau, FCC, to Programming Network Owners (Feb. 15, 2002).

82. Although the primary purpose of the cable horizontal ownership rules is to ensure that the flow of video programming to consumers not be unfairly impeded by cable operators, the record in this proceeding generated almost no comments from independent cable programming networks on the number of subscribers required to remain viable.[302] A more recent inquiry generated a substantial volume of comments opposing mandatory *a la carte* and "themed tier" service offerings, in which independent cable programming networks estimated the number of subscribers they require to remain viable. On May 15, 2004, the Media Bureau issued a Public Notice (*A La Carte PN*) on factual questions regarding the provision of *a la carte* and "themed-tier" services on cable television and direct broadcast satellite systems.[303] The Bureau sought this information in response to specific requests from members of Congress for a report on these issues.[304] On November 19, 2004, the Media Bureau released a report (*A La Carte Report*) on the efficacy of *a la carte* pricing in the pay-television industry.[305] Several video programmers responded to the *A La Carte PN* alleging adverse impacts of mandated a la carte or themed tier offerings.[306] In support of their positions, the programmers identified certain subscriber targets they claimed were necessary to ensure network survival, which they generally claimed would not be possible to accomplish under an a la carte or themed tier regime. Programmer comments on network survival reflect the following: (1) the Commission's suggestion that programming services may survive with a subscriber base of 15 to 20 million subscribers is "long out of date;"[307] (2) on average, niche networks' revenues are split roughly 50-50 between advertising and license fees, both of which are essential to the survival of a niche network because neither is sufficient standing alone, with both tied directly to the network's distribution level – the total number of subscribers who can view the network;[308] (3) a typical new network does not launch until it can gain commitments from MVPDs for distribution to at least 10 million homes within the first two years, and a typical start-up business plan is to reach a minimum of 30 million households within the first three to five years of launch in order to attract sufficient advertising fees to make up for the fact that during the

[302] The America Channel reports that investors desire to reach 50 million subscribers within 5 to 7 years of the launch of a cable programming network. America Channel *ex parte* Comments (Dec. 9, 2004, and Jan. 3, 2005).

[303] *See Comment Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, 19 FCC Rcd 9291 (2004). The Bureau also conducted a symposium to explore the advantages and disadvantages of an a la carte marketing scheme, including possible effects on retail prices.

[304] *See* May 18, 2004 Letter from Congressmen Barton, Dingell, Upton, Markey and Deal of the House Committee on Energy and Commerce to FCC Chairman Powell, and May 19, 2004 Letter from Senator John McCain, Chairman, Senate Committee on Commerce, Science and Transportation to FCC Chairman Powell.

[305] *See Report on the Packaging and Sale of Video Programming Services to the Public* (*A La Carte Report*) (MB Nov. 18, 2004).

[306] *See, e.g.*, Comments filed in MB Docket No. 04-207 (*A La Carte Proceeding*), Oxygen Comments at 2-8; A&E Comments at 15-25; Crown Media Comments at 7-12; TV One Comments at 1-3, Decl. of Larry D. Gerbrandt at 4-11.

[307] *See* Crown Media Comments at 6; GSN Comments at 3-4.

[308] A&E Comments at 19.

early years a new network receives minimal (if any) affiliate license fees;[309] (4) because new networks receive minimal or no affiliate fees, the primary source of revenue for a start-up is advertising revenue, and advertising revenue only becomes viable once a network has 20-25 million subscribers, but even at these subscriber levels, it is impossible to sell meaningful national advertising;[310] (5) although Nielsen will rate a network with 20 to 25 million subscribers, ratings data at these levels are unstable and of little value until the network reaches current survivability targets, somewhere between 40 to 60 million subscribers;[311] and (6) because advertisers are primarily interested in subscriber growth, even at the 50 million or more subscriber level, a network must be able to demonstrate that its distribution is growing, or risk advertiser abandonment.[312] We find this data relevant to our analysis of reasonable horizontal ownership limits and intend to incorporate by reference the data filed in MB Docket No. 04-207 into the record of this proceeding. We seek comment generally on how this data should be applied and specifically on the impact of these changing subscriber targets on the calculation of the number of subscribers a programmer requires for launching and remaining viable in today's marketplace.

83. Regardless of the horizontal ownership limit we adopt, reliable MVPD subscribership data is needed to determine whether a violation occurs. The *1999 Cable Ownership Order* endorsed the use of published, current and widely-cited industry data to establish the number of MVPD subscribers nationwide, for purposes of determining a cable operator's share of the market.[313] Subscriber data are currently available from a variety of published sources; however, at times, these publicly available sources are inconsistent with one another. In addition, firm-specific subscriber figures submitted to the Commission may differ from figures reported in other contexts (*e.g.*, in SEC filings or investment reports). We seek comment on whether we should take steps to address the reliability of any subscriber

[309] *See* TV One Comments, Decl. of Larry D. Gerbrandt at 4.

[310] *Id.* at 6; GSN Comments at 3-4; Oxygen Comments at 4.

[311] A&E Comments at 19 (a national niche network needs to achieve a threshold level of at least 30 to 40 million subscribers); Bloomberg Comments at 5 (once the service reaches 40 million subscribers, it will be able to generate higher affiliate and advertising fees to sustain the service over the long-term); Oxygen Comments at 4 (ratings data useful only once network reaches 45 to 50 million subscribers); GSN Comments at 3-4 (50 million is the approximate threshold for achieving meaningful national advertising revenues); TV One Comments, Decl. of Larry D. Gerbrandt at 4 (combination of advertising and affiliate fees exceeds operating, marketing and programming expenses when network reaches 40 million or more households); Viacom Comments at 19 (50 million households are necessary in order to reach a meaningful number of viewers); Crown Media Comments at 6 (more realistic plateau for meaningful advertising revenues is now approaching 50 to 60 million subscribers; "with nearly 26 million full and part-time subscribers, the performance of the Hallmark Channel's predecessor was stagnant and its financial prospects were dim").

[312] GSN Comments at 4. *See also* Morgan Stanley Equity Research, *News Corp., Highlights from the Media Conference*, September 9, 2004 at 1 ("Currently, the peak potential distribution for smaller cable networks is estimated at 40-50 million subscribers, but this number is likely to increase over time, creating further opportunities for growth at Fox's youngest networks.").

[313] *See 1999 Cable Ownership Order*, 14 FCC Rcd at 19112 at ¶ 35. *In the 1999 Cable Ownership Order*, we recognized that "not all of the data used by the industry is identical and that some degree of estimation and double counting may be involved." *Id.* At that time, the Commission found it unnecessary for the Commission or firms subject to the ownership limit to refine generally accepted industry estimates because the rule was based on estimates. *Id.*

data we may use in applying the horizontal limit, and whether the Commission should adopt its own data collection procedures to obtain industry-wide subscriber data.

84. As noted above, the Media Bureau recently released Media Bureau Staff Research Paper No. 2004-1 (*Survival Analysis*), which focuses on the actual failure and success rates of networks and the relationship of those rates to subscriber reach.[314] We seek comment on the value of this method in developing a horizontal limit under the open field approach. We also seek comment on the method as applied in the *Survival Analysis* and alternatives and refinements to the methods employed.

(2) Monopsony Framework

85. *Time Warner II* faulted the Commission's open field analysis for failing to identify a non-conjectural harm, and for providing no analysis of whether cable operators have the ability to exercise market power.[315] It stated that the statute requires the Commission "to assess the determinants of market power in the cable industry and to draw a connection between market power and the limit set."[316] In the *2001 Further Notice* we sought comment on the harms that might result from high concentration, including those that result from anti-competitive behavior.[317] We asked at what level of concentration a large cable operator gains sufficient market power to be able to refuse carriage of programming for reasons other than consumer demand.[318] We further asked questions that would help answer whether cable operators have market power, and whether they have an incentive to exercise it. Our questions concerning the concentration of the market, and whether a 40% open field was sufficient for entry by the typical programming network, relate to two key determinants of market power, which are the number of competitors in the market and the ability of firms to enter the market.[319] In this and the next sections we discuss the comments we received, and the further questions that we find need to be answered, concerning several theories of harm based on market power, and how a horizontal limit can eliminate those harms.

86. In response to the *2001 Further Notice*, some commenters argue that the market for programming does not meet the key conditions necessary for the monopsony[320] model to be applicable. For example, they argue that the supply curve is not upward sloping, and that buyers cannot force the

[314] *See* ¶ 16 *supra*.

[315] "Having failed to identify a non-conjectural harm, the Commission could not possibly have addressed the connection between the harm and market power. But the assessment of a real risk of anti-competitive behavior--collusive or not--is itself dependent on an understanding of market power … ." *Time Warner II*, 240 F.3d at 1133-34.

[316] *Id.*

[317] *2001 Further Notice*, 16 FCC Rcd at 17340 ¶ 57.

[318] *Id.* at 17328, 17340-41 ¶¶ 28, 58.

[319] *Id.* at 17340-41 ¶ 58.

[320] A firm is called a "monopsony" if it is the only buyer in a market, and a firm that is the only seller in a market is called a "monopoly." Dennis W. Carlton and Jeffrey Perloff, MODERN INDUSTRIAL ORGANIZATION 87, 105 (3rd Ed., 2000) (Carlton and Perloff).

price down by reducing their purchases, because it is costless to supply programming to one more subscriber, if the service is already being provided to other subscribers.[321] Other commenters argue that the talent used to provide programming have plenty of other employment opportunities, such as theatrical motion pictures and broadcast network programming, and therefore the supply of such services is likely to be flat.[322]

87. To support using the theory of monopsony to demonstrate how a large purchaser of programming could cause harm to the market, CFA points to numerous, widely accepted economic theories that state a monopsonist would have the power to decrease programmers' output and the prices they receive.[323] It claims that these theories apply to cable operators' relationship to programmers.[324] We seek comment on the appropriateness of applying standard monopsony arguments to our analysis of the specific nature of the programming market.

88. Commenters proposing monopsony as an analytical framework should address how monopsony power can be measured. Can Pigou's Index (called by Pigou the "rate of exploitation"), which is the monopsony version of Lerner's Index, be used to measure monopsony power here?[325] Are there other measures that indicate that monopsony power is being exercised? For example, is the failure of some networks to gain carriage an indication that monopsony power is being exercised, or is it due to the low quality of those networks? Are launch fees[326] a means of extracting monopsony rents, or are they serving a filtering function to help weed out low-quality networks?[327] Some cable operators have sought equity from programming networks as part of their carriage negotiation stance.[328] Is this an

[321] Time Warner Comments, Joskow and McLaughlin Decl. at 8-9; AT&T Comments, Ordover Decl. at 12-13.

[322] Time Warner Comments, Joskow and McLaughlin Decl. at 9.

[323] CFA Comments at 91-92.

[324] *Id.* at 26, 28 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); *United States v. Philadelphia National Bank*, 374 U.S. 270 (1966)).

[325] Pigou's Index is the measure of the difference between the input price and the marginal revenue product. Pigou's Index = $E = (MRP-w)/w = 1/e^s$, where MRP = marginal revenue product = revenue produced by purchasing one more unit of the input, w = the cost of the input, and e^s = the price elasticity of supply. William Boal and Michael Ransom, *Monopsony in the Labor Market*, 35 J. OF ECON. LITERATURE 1, 86-112 (Mar. 1997).

[326] In the case of a new programming network, an MVPD may demand that the programmer pay it for the right to access its subscribers (a practice sometimes referred to as a "launch fee").

[327] Launch fees in the cable industry have certain similarities to "slotting allowances" in the grocery industry. Slotting allowances are payments by manufacturers to grocers for stocking new products. The Staff of the Federal Trade Commission has identified a number of possible benefits and harms of the practice, including its use as a signal of quality and as a by-product of market power at the retail level. Federal Trade Commission Staff, *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry*, February 2001.

[328] *See The Bridge July 2004* (". . . many big providers will want a piece of the new channel company"); The Cable Center, *Peter Barton: An Oral History* ("The theory was, why not own - because we had the leverage to own - why not insist on owning a piece of programming service.") available at http://www.cablecenter.org/library/collections/oral_histories/subjects.cfm.

exercise of monopsony power, or is it a more efficient mechanism of risk- and profit-sharing than a simple fixed price for carriage? Does the alleged need for a new network to have bargaining leverage, usually in the form of an affiliated broadcast station or popular network,[329] indicate that monopsony power is being exercised against independent networks lacking popular affiliates, or is this bargaining just an efficient means of achieving the transaction at lower cost?[330]

89. The most significant challenge to the use of the monopsony model would appear to come from the need for prices for individual transactions to be publicly known and to vary with the market-clearing price. The market for programming appears to be characterized by private bilateral negotiations that yield complex prices that are not made public. If this is the case, is there a market price that could be affected by the monopsonist's purchasing decisions? If the existence of private negotiations with nonpublic terms of agreement implies that there is no market price, then we ask whether a bilateral bargaining model would be more useful for analyzing the programming market than the monopsony model. We discuss the use of bilateral bargaining models in the next section.

(3) Bargaining Power as a Source of Unilateral Anticompetitive Action

90. Bargaining theory is an alternative framework to the theory of monopsony for analyzing how a large purchaser of programming services could exercise market power and cause harm to the market. In the *2001 Further Notice* we suggested that at much higher levels of concentration cable operators could use their bargaining power to force down the prices they pay for programming, which could harm the flow of programming.[331] We explore here bargaining power as a source of unilateral anticompetitive action. Bargaining theory may better describe and model the private negotiations and non-public terms of agreements typically employed in the purchase of programming by cable operators, as compared to the theory of monopsony. Bargaining theory is often used to model bilateral negotiations,[332] and is usually better able to handle complex market structures, and to take into account transaction-specific factors.

91. Several specific institutional features shape the economics of negotiations between programming networks and MVPDs. For example, prior to entering negotiations, MVPDs and programming networks make substantial investments. For MVPDs, these investments include the construction of their video distribution systems. These costs, however, are systemic rather than specific to the contractual relationship with any single programming network. For programming networks the

[329] Some of these may involve retransmission consent agreements of local broadcast stations, while others may involve the carriage of new networks' negotiations for carriage of a particularly popular network.

[330] The tying of carriage of a new affiliated network to an agreement for carriage of a popular network or station can be mutually beneficial to the cable operator and network, since the cable operator may provide something that is lower cost (the channel capacity), compared to paying the full cash value of the popular network, while the network gains carriage of a potentially-profitable affiliate. In other words, it may be of lower cost to each side than would strictly cash deals of the cable operator paying a popular network for carriage, or for a program producer paying to get carriage for its new, unproven network.

[331] *2001 Further Notice*, 16 FCC Rcd at 17327-28, 17333-34 ¶¶ 26, 43.

[332] Drew Fudenberg and Jean Tirole, GAME THEORY, ch. 10 (1993).

investments include the acquisition or production of programs. Importantly, the programming network must continue to incur these costs on an ongoing basis to develop new content. Moreover, a significant portion of these investments are considered specialized, in that a substantial portion of the investments would be lost if the programming network failed to obtain carriage on cable systems or other MVPDs.

92. After making these investments, programmers and MVPDs enter into contractual negotiations. During this process, programming networks attempt to maximize their affiliate fees and advertising revenue. In contrast with programmers, which compete fiercely for carriage, MVPDs generally do not compete with each other to acquire programming.[333] On the other hand, MVPDs likely attempt to maximize their subscription and advertising revenue while attempting to minimize their affiliate payments. In economic terms, each MVPD and each programmer are engaged in a bilateral bargaining problem.

93. The bargaining and contract theory literature has established that when at least one side of the negotiation has sufficient bargaining power, inefficiencies can arise.[334] One source of inefficiency is directly related to the relative bargaining power of the parties. Many programming networks compete among themselves for the right to sell programming to an MVPD and thereby acquire access to its subscribers. Thus, the cost the MVPD incurs from not reaching an agreement with any particular programming network is low because of the willingness of competing programming networks to sell to it. However, the cost a programming network incurs from not reaching an agreement with a large cable operator may be high if access to that operator's subscribers is needed for it to remain viable and earn a profit.[335] According to this reasoning, because of the existence of one or more close substitutes, some programming networks may have very little bargaining power in negotiations with MVPDs. However, other programming networks may have few close substitutes and, if popular, may have substantial bargaining power over MVPDs.[336] Moreover, the situations in which a programming network can be expected to have the least amount of bargaining power relative to a cable operator are those in which the investment costs of the programmer are high, and the cost incurred by the cable operator from declining to carry it is low. Thus, it is plausible that programming networks with low relative bargaining power may be unable to recover their fixed programming costs. In this instance, the bargaining power of a cable operator may induce a programming network to exit the market, or to reduce its costs by lowering the quality of its programming. We ask for comment on whether a cable operator of sufficient size would have the bargaining power to force prices down, and whether this would reduce the quality and flow of programming, and create economic inefficiency. Furthermore, we ask how we can determine at what level this would occur.

[333] Absent an exclusivity provision, one MVPD's acquisition of program carriage rights does not diminish the supply of programming available to other MVPDs.

[334] We use the term economic efficiency in its generally accepted sense – the maximization of society's scarce resources. However, in the discussion of the BKS Study, the term efficiency is used in a narrower sense of "trading efficiency," which is one of the three sources of (in)efficiency discussed in this section.

[335] For example, Comcast is generally viewed as an important distributor for video programmers. *See* George Anders, *Want to Start a TV Channel?; Amy Banse*, WALL ST. J., Jan. 19, 2004 ("If you've got Comcast behind you, you're practically guaranteed of being a success."); Andrew Grossman, *NBA TV scores Comcast Deal*, HOLLYWOOD REPORTER, Mar. 10, 2004, at 4, (referring to Comcast as "the cable gorilla that every programmer needs").

[336] *See News-Hughes Order*, 19 FCC Rcd at 543-48 ¶¶ 147-62.